The City of New York

POLICE DEPARTMENT

In the Matter of the Disciplinary Proceedings	:	
- against -	:	FINAL
Police Officer Brendan McGarry	:	ORDER
Tax Registry No. [redacted]	:	OF
Military & Extended Leave Desk	:	DISMISSAL

Police Officer Brendan McGarry, Tax Registry No. 935736, Shield No. 29644, Social Security No. ending in [redacted] having been served with written notice, has been tried on written Charges and Specifications numbered 2014-11288, as set forth on form P.D. 468-121, dated February 7, 2014, and after a review of the entire record, has been found Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Brendan McGarry from the Police Service of the City of New York.

WILLIAM J. BRATTON
POLICE COMMISSIONER

EFFECTIVE: 0001 hrs. March 21, 2016

The City of New York

POLICE DEPARTMENT

March 7, 2016

In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2014-11288
Police Officer Brendan McGarry	:	
Tax Registry No. 935736	:	
Military & Extended Leave Desk	:	

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable David S. Weisel
Assistant Deputy Commissioner - Trials

APPEARANCE:

For the Department: Penny Bluford-Garrett, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

HONORABLE WILLIAM J. BRATTON
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

The above-named member of the Department appeared before the tribunal on February 23-24, March 25, April 16, May 21 and June 12, 2015. The record was re-opened for new evidence at Respondent's request. Additional dates of trial were held on November 16 and December 8, 2015.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Police Officer Sandro Scacchi, Sergeant Michael Reese, Dr. Thomas Cairns, and Sergeant Carl Scognanillo as witnesses. Respondent called Sergeant Andrew McEvoy and Lieutenant Tony Giorgio as witnesses, and testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, Respondent is found Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

Background

Respondent was assigned to the Ceremonial Unit since 2007. As part of that unit, Respondent attended ceremonial details such as funerals, parades, promotions, and sporting events, as a representative of the Department. After approximately one year in the unit, Respondent was designated a team leader. In that capacity, Respondent was responsible for coordinating daily assignments and acted in a supervisory role within the unit (Tr. 318-19, 375, 393).

On January 27, 2014, Respondent was randomly screened for drugs by the Department. Police Officer Sandro Scacchi at the Medical Division collected three hair samples from Respondent's leg, two of which were sent to Psychemedics Corporation. A urine sample also was collected and sent to Quest Diagnostics. A third hair sample was stored at the Medical

Division so that, in the event Respondent's first two hair samples tested positive, he could send the third sample to a lab of his choosing for independent testing. On February 6, 2014, Psychemedics notified the Department that Respondent's hair samples tested positive for cocaine (Dept. Exs. 10a & b). On February 7, 2014, Quest notified the Department that Respondent's urine sample tested positive for cocaine metabolites (Dept. Ex. 11). Respondent elected to send his third NYPD hair sample to Omega Laboratories, which also tested positive for cocaine (Dept. Ex. 14) (Tr. 15-16, 26, 33, 39, 43-44).

The issue to be determined in this case is whether or not Respondent wrongfully possessed and ingested cocaine, allegedly proven by the presence of cocaine and its metabolites in his bloodstream. The tribunal finds that the Department proved by a preponderance of the credible evidence that Respondent engaged in the alleged misconduct.

The Testing Process

Respondent's testing samples were taken at the Medical Division's Drug Screening Unit by Police Officer Sandro Scacchi, who had received training in the collection of hair and urine samples. Scacchi testified that his practice was to positively identify the donor and conduct the necessary Medical Division paperwork before samples were collected. Respondent was required to list on two separate questionnaires for hair and urine any medications taken within the past three months. He reported that had taken three medications, including the antibiotic amoxicillin (Dept. Exs. 1 & 2). Respondent was then assigned a unique donor identification number and completed the custody and control forms (Dept. Exs. 3, 4 & 6) for his hair and urine samples (Tr. 14, 16-19, 20, 23-24).

According to Scacchi, he adhered to standard procedures when collecting Respondent's hair samples. Scacchi wiped down the table with alcohol and covered it with white paper. With gloved hands, he then sprayed the officer's leg with alcohol and used a new razor to shave the

leg hair onto the paper. Here, the hair sample was taken from Respondent's leg because the hair on his head was not long enough. Scacchi then separated the hair into three samples and packaged them in three separate foil envelopes, which were initialed by the officer. Two of the samples were then placed in a larger envelope, again signed by the officer, and stored in a locked cabinet at the Medical Division (Tr. 24-26, 35).

Scacchi also collected a urine sample from Respondent. He accompanied the officer into a single-person bathroom used only for drug testing. There, he observed him urinate into a large plastic container. Once finished, the officer poured the urine from the large container into two smaller containers and sealed each with a security sticker. Each container was placed in a plastic bag and secured in a locked refrigerator (Dept. Exs. 5 & 7, records of storage entries), along with the corresponding custody and control forms (Dept. Ex. 6), within the Medical Division (Tr. 38-39, 43-44).

The following day, two of Respondent's hair samples were sent to Psychemedics and his urine samples were sent to Quest for testing via FedEx. Respondent's third hair sample remained secured in the designated third-sample cabinet at the Sick Desk (Tr. 43-44).

Psychemedics Results: The Hair Samples

Dr. Thomas Cairns is the senior scientific advisor and deputy lab director at Psychemedics. Psychemedics is licensed by the New York State Department of Health in forensic toxicology with a particular emphasis on hair testing for drugs of abuse. Cairns was deemed an expert in the field of forensic toxicology with respect to the testing of hair and urine for drugs of abuse (Tr. 152, 157; Dept. Ex. 15, curriculum vitae).

Cairns explained that when cocaine is ingested into the body, it is absorbed into the bloodstream. As cocaine-contaminated blood passes through the liver, it is metabolized into its primary metabolite benzoylecgonine (BE), as well as cocaethylene (CE) and norcocaine.

Cocaine and the metabolites are carried by the bloodstream to the base of every strand of hair. As the blood enters the base of a strand of hair, both cocaine and the metabolites get trapped in the follicle. Thus, the hair "captures each and every incident of ingestion and represents the cumulative amount of cocaine ingested." Hair samples taken from the leg provide a look-back period for drug use of approximately six to seven months (Tr. 160, 163).

The first test performed by Psychemedics on a hair sample was enzyme immunoassay. If this screening analysis indicated the presence of cocaine at or above the administrative cutoff of 5 nanograms per 10 milligrams of hair, it was considered a presumptive positive. The cutoff was supported by clinical analysis and approved by the Food and Drug Administration to make a marked differentiation between an intentional user and someone that had been exposed passively. Additionally, in order for a sample to test positive, the concentration of BE must be 5% or more than the total concentration of cocaine detected (Tr. 164, 167, 170).

In presumptive positive cases, another portion of the sample was "aggressively" washed to remove external contamination. The sample then was analyzed using mass spectrometry. If mass spectrometry revealed the presence of cocaine metabolite at or above the cutoff, the lab then tested the second sample for confirmation (Tr. 165, 170, 176).

Cairns noted that cocaethylene uniquely formed when cocaine and alcohol were ingested at the same time (Tr. 167).

At trial, Cairns reviewed the laboratory data package produced by Psychemedics for Respondent's samples (Dept. Ex. 16). The package showed that the chain of custody remained intact. Respondent's first hair sample tested positive for cocaine at a level of 35.2 ng/10 mg, BE at 5.1 ng/10 mg, CE at 5.1 ng/10 mg, and norcocaine at 1.2 ng/10 mg. Respondent's second sample tested positive for cocaine at a level of 33.7 ng/10 mg, BE at 5.6 ng/10 mg, CE at 5.4 ng/10 mg, and norcocaine at 1.2 ng/10 mg. Cairns attributed the difference between the two

samples to the variation in the length of the hairs sampled. Respondent's first sample contained hairs of up to 3 centimeters in length, while his second sample contained hairs of up to 2.7 cm. Because both samples tested positive at a level above the administrative cutoff, they indicated ingestion of cocaine on multiple occasions during the six- or seven-month look-back period (Tr. 168-72).

Quest Results: The Urine Samples

Cairns also reviewed and interpreted the data contained in the laboratory data package produced by Quest for Respondent's urine samples (DX 18). He noted that while the hair samples provided a look-back period of six to seven months, it still took approximately five to seven days for hair to emerge above the skin to be sampled. Thus, any drug use that occurred five to seven days before the date of collection would be hidden because that portion of the hair still would be beneath the skin. The urine samples filled in the gap in the timeline just prior to the date of the hair collection and had a look-back period of 72 hours. Respondent's two urine samples tested positive for BE at a level above the prescribed cutoff of 150 nanograms per 10 milliliters of urine, indicating ingestion of cocaine in the 72 hours prior to the date of collection (Tr. 160).

Omega Results: The Third NYPD Hair Sample

Sergeant Michael Reese, a supervisor in the Drug Screening Unit, testified that after being notified that Respondent's first two hair samples tested positive, the third hair sample was removed from the third-sample locker and moved to a safe in the Medical Division's administrative office. Sometime thereafter, Respondent returned to the Medical Division in order to have his third sample sent out for testing. Reese testified that the Department procedure was for the officer to be present when his third sample was removed from the administrative safe and inspect it. Respondent chose Omega Laboratories for testing his third sample (Tr. 104, 106,

121-23; Dept. Ex. 8, Medical Division third-sample receipt log; Dept. Ex. 9b, envelope containing third sample after removal from safe; Dept. Ex. 9a, command log documentation of removal).

Cairns reviewed and interpreted the data contained in the Omega data package (Dept. Ex. 17). He explained that analysis of a third sample is supposed to be done without regard to cutoff and only to confirm or disaffirm the presence of cocaine and metabolites using mass spectrometry. Analysis of Respondent's Omega sample confirmed the presence of cocaine at a level of 13.6 ng/10 mg, BE at 2.9 ng/10 mg, CE at 2.7 ng/10 mg, and norcocaine at 0.6 ng/10 mg. The deviation between the Psychemedics and Omega results was relatively common, however, because of the labs' different yet acceptable procedures. Psychemedics used a digestion procedure to dissolve the hair, thus releasing the trapped drugs. Omega used a solvent to extract them after pulverizing the hair into submillimeter lengths, a process known as ball-milling. Cairns noted that although Omega stated in its report that there was an approximately 12-month look-back period, this was a generalization about all body hair, including, for example, pubic hair, which did have a 12-month look-back. The sample sent from the NYPD to Omega, like those sent to Psychemedics, was from Respondent's leg. This leg hair had a 6 to 7month look-back (Tr. 187-91).

Respondent's Independent Hair Sample

Respondent testified that after he was notified of the positive test result, he found a medical facility to collect another hair sample that would be tested by Omega. Respondent wanted to have this fourth sample tested by Omega because he wanted to make sure the look-back period was long enough to overlap with his samples taken at the Medical Division. On February 24, 2014, Respondent provided a sample of hair from his armpit. According to a one

page result report from Omega, dated February 27, 2014, Respondent's sample tested negative for all drugs (Tr. 353; DX 13).

Cairns again noted that the Omega independent sample provided a 6- to 7-month look-back period, just like the NYPD samples taken from Respondent's leg. This was despite Omega's statement that its testing provided an approximately 12-month look-back. As Cairns indicated, Omega's statement about 12 months was a generalization about all body hair, including pubic hair. Moreover, the independent Omega sample was taken nearly a month after the NYPD samples. Because there was no data package, the chain-of-custody information was missing and the data was preliminary at best. This made it difficult to assess the reliability of the test. Omega should have done mass spectrometry to confirm or disaffirm the positive NYPD results. Omega had a mass spectrometer, as it used it to test the third NYPD sample at Respondent's request. But Omega did not use it to test the independent sample. This meant that cocaine still could have existed in the independent sample, but below the cutoff. In sum, there was insufficient probative information about the meaning of the test (Tr. 190-91, 294-96).

Defenses

Respondent posited several defenses to the charges of the possession and ingestion of cocaine. One was that the collection and testing processes were vulnerable to human error and therefore were not reliable. Another was that his independent test came back negative. Next, Respondent asserted that the positive test results were caused by his taking amoxicillin for a sinus infection. Finally, he argued that cocaine use was inconsistent with his character and how he presented himself.

The Collection and Testing Processes

Scacchi, the Medical Division officer that took Respondent's hair and urine samples, testified credibly about the standard procedure to which he adheres. Reese, the sergeant that

ensured Respondent's third sample was sent to a non-Psychemedics lab for confirmatory testing, testified similarly and the Court credits his testimony as well. They did not necessarily indicate that they recalled very much about Respondent specifically.

The Department thus established that Respondent's hair and urine samples were collected, packaged, sealed and transported properly to the three NYPD labs for testing. Respondent pointed to nothing about the collection processes at the Medical Division or the testing processes at the labs indicating that any sort of error was made. The mere possibility that something could have gone wrong is speculative and the Court rejects it. Cf. *Case No. 81240/05*, p. 67 (Apr. 24, 2006) ("It is abundantly clear" that officer's "head hair was carefully cut, packaged and sealed, by the Department, under a clean environment"), confirmed sub nom. Matter of Friscia v. Kelly, 51 A.D.3d 451 (1st Dept. 2008); *Case No. 70714/96 et al.*, p. 42 (Jan. 16, 1997) ("[T]he Department amply proved that the samples were carefully obtained using a licensed laboratory's procedures"), confirmed sub nom. Matter of Brinson v. Safir, 255 A.D.2d 247 (1st Dept. 1998).

The Independent Negative Test

The test of Respondent at Omega on his own initiative, on February 24, 2014, came back negative. As Cairns explained, however, this result did not mean that there were no cocaine or cocaine metabolites in the sample because it was not tested further quantitatively to determine whether mass spectrometry could detect the smallest amount of cocaine or cocaine metabolites possible. Furthermore, there was no laboratory data package accompanying the fourth test, so the Court cannot assess the lab's methods and procedures. There was not even documentation of chain of custody to prove it was Respondent's sample. All that was provided was a one-page printout.

Because only an initial screen was conducted, as opposed to mass spectrometry at the limit of detection, the test could not confirm whether any cocaine or its metabolites at all were in the independent sample. This is important because the independent sample was taken nearly a month after the original NYPD samples. Respondent could have abstained from cocaine use after the original sampling, leading, several weeks later, to a result that was below the Omega Laboratories cutoff but still containing cocaine or cocaine metabolites. See *Case No. 2011-3687*, p. 20 (Mar. 12, 2012).

For these reasons, the Court cannot place any reliance on the fourth, independent test.

Alleged False Positive

The alleged false positive relates to Respondent's visit to a walk-in medical clinic on January 4, 2014. He complained of sinus congestion and was diagnosed with sinusitis. He was prescribed amoxicillin, an antibiotic (see Dept. Ex. 19, Medical Records).

Cairns noted that Respondent's diagnosis of acute sinusitis, a disruption in the mucus membrane of the nose, was itself a common effect of snorting cocaine. He admitted, however, that there were some antibiotics, including amoxicillin, that could trigger a presumptive positive during the immunoassay portion of the urine test. According to Cairns, however, the sample would then test negative during subsequent mass spectrometry testing which identifies molecules by their unique molecular shape. Cairns asserted, in any event, that it would take a "truckload" of antibiotics to trigger this presumptive positive on the immunoassay (Tr. 202-03, 206, 286, 306).

Respondent was instructed to take the amoxicillin for 10 days, twice a day, and finish the course of treatment on January 13, 2004 (Dept. Ex. 19, p. 3). Respondent testified, though, that he was not "a big medicine person." He did not pick up the prescription from the pharmacy until the 6th or 7th of January and only started taking it on the 10th. Nor was he taking it twice a day

as instructed. He must have been finished with it by Friday, January 24 or Saturday, January 25, 2014, two or three days before the test, because he went out for drinks for his birthday (January 22) that weekend. Therefore, according to Respondent, he was still taking it at the time he was tested (Tr. 359-61).

Even if the amoxicillin could have led to an ultimate positive result – something Cairns credibly testified was impossible – Respondent's testimony was utterly inconsistent with the rest of his and his witnesses' characterization of his personality and judgment. Respondent presented himself as a very strait-laced, by-the-book kind of person. When asked if he ever failed to appear for duty with all of his required equipment and uniform, Respondent answered, "No, I was the guy that got made fun of because I always had everything." He testified that since his placement on suspended duty with pay and having to sign in every day to the Internal Affairs Bureau office on Hudson Street, he never was late and in fact, was the first one there every day (Tr. 335-36, 338).

Respondent also pointed to his responsibilities with the Ceremonial Unit, the Department section that coordinates the provision of uniformed members to serve at special events involving the Department. Some of these involved various dignitaries and some required him to be a pallbearer at Department-member funerals. Ceremonial Unit members are well known for their crisp military uniforms and highly-shined shoes. In fact, one of Respondent's character witnesses testified in his uniform as an exemplar of the exactitude to which Respondent was expected to adhere (Tr. 319-20, 338-39, 373, 382-83).

Respondent felt sick enough to go to a walk-in clinic to see a doctor. He must have known that prescription medication was a possibility; otherwise, there would have been little reason to see a doctor over a sinus infection. It is incongruous, then, that after having been prescribed an antibiotic to treat an infection that was serious enough to make him go to the

doctor, Respondent, a supposed strict rule-follower, basically blew off the treatment and actually was still taking the amoxicillin more than three weeks after the doctor's visit, just long enough for it to be in his system for the urine test. The Court rejects this testimony as too convenient and not credible.

The Court also notes that Respondent's testimony about drinking alcohol around the time of the test is consistent with the finding in his hair and urine of cocaethylene, the metabolite of cocaine specifically formed when cocaine and alcohol are used together.

Character Witnesses

Two of Respondent's supervisors from the Ceremonial Unit testified on Respondent's behalf. Sergeant Andrew McEvoy was Respondent's direct supervisor. He testified that Respondent was "probably just about one of the best officers I've ever supervised," and he never saw Respondent appear to be under the influence of drugs. Lieutenant Tony Giorgio, the commanding officer, had "a very high opinion" of Respondent and was shocked when he heard the allegations (Tr. 377-78, 393). The Court notes, however, that that it is impossible for anyone to know what a colleague does in his free time after work. See *Case No. 2014-12161*, p. 13 (July 30, 2015).

Respondent pointed out that Cairns testified the NYPD results suggested someone using 10 to 12 lines of cocaine a month, if it were snorted powder. Respondent argued that it would have been impossible for someone to perform Ceremonial Unit duties, with all eyes on him, in front of everyone from grieving relatives to the President of the United States, if he was a regular cocaine user (Tr. 180-81, 405-08).

The tribunal disagrees. 10 to 12 lines of cocaine per month is not daily use, far from it. It is consistent with Respondent using cocaine on his days off and returning to sobriety afterward.

Anonymous Letter

After the trial was completed, the Court was alerted to the possession by IAB of an anonymous letter referencing Respondent (Respt. Ex. A). The letter itself was undated but the postmark on the envelope was June 30, 2015, approximately two and a half weeks after decision was reserved in this matter.

The letter had a return address for '[redacted]' and gave an address on [redacted] in [redacted] Long Island. It was addressed to "NYPD Deputy Commi[ssi]oner Tucker" and postmarked from a central facility in [redacted] County (Tr. 451). The writer stated that he (or she) worked at a bar in Long Beach (this is not far from [redacted]). He stated that there was a regular customer named Frank, who was a retired NYPD officer and spent a lot of money at the bar. Frank was "usually quite reserved" but sometimes got very drunk "and runs his mouth." Recently Frank told the writer and others that he got another NYPD officer, Brendan, "jammed up." Frank laughed as he recounted how he poured cocaine into Brendan's beer and later found out that he failed a drug test.

The writer knew Brendan somewhat, as he came into the bar occasionally but not in some time. He believed his last name was "McGary" or "McGarrity." He remembered that Brendan formerly was assigned to the "NYPD funeral detail," and saw him standing in a ceremonial role during the 2011 telecast of the 9/11 memorial ceremony.

The writer did not know why Frank had a problem with Brendan. The writer wanted to "do the right thing" but was reluctant to get involved, as he was in the United States on a work visa and the owner of the bar was a friend of Frank. The writer called IAB but a "Sergeant" told him to stop wasting their time.

IAB Investigation of the Letter

Sergeant Carl Scogmanillo investigated the letter for the Internal Affairs Bureau. He first interviewed Respondent to get the names of some bars in Long Beach that he frequented before the drug test. Respondent gave them four bars and Scogmanillo canvassed them. At the fourth location, Nolan's, Scogmanillo found some people outside. One patron turned out to be a retired NYPD officer as well, by the last name of [redacted] Scogmanillo asked [redacted] if he knew a loudmouth named Frank. Sure enough, he did. Scogmanillo asked about Frank's employment. Frank, said [redacted], was a retired officer too. Scogmanillo testified that [redacted] said Frank lived in [redacted], the village listed on the return address of the letter IAB received. [redacted] described Frank as 35 to 40 years old with a short haircut, and said that he frequented a barbershop next to Gino's Pizzeria on Sunrise Highway (Tr. 428-30, 432-35, 454).

Scogmanillo found the barbershop but no one there knew Frank. A bartender at Nolan's had no idea what Scogmanillo was talking about either. Next, Scogmanillo searched in the IAB database for officers named Frank born in the 1970s and 80s and living in [redacted] He found two names, one of which was a retired officer named Frank [redacted] He put a photograph of that Frank in a photo array and showed it to [redacted], who picked [redacted] Neither Respondent nor Respondent's wife, who also patronized taverns with him, recognized anyone. Scogmanillo did not find [redacted] at Nolan's (Tr. 435-38, 442-44, 450-51, 461-62).

Scogmanillo did not contact [redacted], however. In IAB's view, because Respondent did not identify [redacted] in the photo array, Scogmanillo would be accusing him without cause. There were no witnesses that [redacted] actually did anything, other than be a loudmouth barfly. The letter itself was anonymous. It alleged that a crime had taken place, so if Scogmanillo questioned [redacted], it would constitute a custodial interrogation (Tr. 438-40, 442-44).

Respondent's counsel represented to the Court that he was unable to make contact with [redacted] (Tr. 468-71).

Scientific Testimony About the Letter's Claims

Dr. Cairns of Psychemedics was re-called to give scientific background about the feasibility of the claims made in the letter. He stated, with "firm scientific certainty," that the scenario in the letter could not have led to Respondent's positive results (Tr. 474).

First, Cairns said, powder cocaine would mostly float on top of the surface of a glass of beer, due to the fact that the water in the beer, its majority component, was heavier than the cocaine, the cocaine was not very soluble, and the powder itself was puffy. Even a line of cocaine would float upon the beer surface (Tr. 475-76, 488-89, 493).

Second, the amounts on the two Psychemedics tests were 35.2 and 33.7 nanograms per 10 milligrams of hair. The look-back period for hair like that used in Respondents' tests was six to seven months, approximately 200 days. If Frank's supposed tampering with the beer happened only on one day, this meant that the amount of cocaine would be 200 multiplied by 35.2 or 33.7, approximately 7,000 ng. The amount of cocaine needed to get to that concentration would cause death or at least severe cardiac problems. If it was on multiple occasions but still without Respondent's knowledge and thus in amounts small enough not to intoxicate him, this small quantity would have to have been ingested over the course of 100 days, or every other day. The cocaethylene amounts, indicating the consumption of alcohol and cocaine within about an hour of each other, were consistent with, for example, placement of the cocaine in the beer on 50 separate days (the CE amount for the first sample was 5.1 ng/10 mg of hair, which was 7 to 8% of the cocaine) (Tr. 476-88, 490-92).

Analysis of the Letter

Involuntary ingestion is an affirmative defense upon which Respondent bears the burden of persuasion. Matter of Green v. Sielaff, 198 A.D.2d 113 (1st Dept. 1993). In the tribunal's view, the letter did not provide a reasonable basis for concluding that "Frank" tampered with Respondent's beer, causing him to test positive.

It is undisputed that Respondent hung out at bars with other members of the service, including those who were retired. The letter, while claiming to be from a bar employee in the United States on a work visa, uses English fluently – it even spells "ostracize" with a z in the American format. The letter also displays familiarity with the NYPD, using terms like "detail," "jammed up," capitalizing "Sergeant," and knowing not only the name and floor of the First Deputy Commissioner but also that he has oversight over disciplinary affairs. In sum, the letter displayed an intention to deceive the Department into thinking the writer was a disinterested observer, rather than someone very familiar with the Department, like a retired member, for instance.

Moreover, the Court is aware that there was an earlier letter alleging similar circumstances. In fact, Scogmanillo assumed that the alleged tamperer was the same person in both letters. The first letter turned out to have Respondent's [redacted] (Tr. 450, 453).

The tribunal questions Scogmanillo's view that he could not legally ask [redacted] about [redacted]s claims. IAB's investigation as a whole, nevertheless, revealed little more than that Respondent hung out with many members of the service, including retired ones, at bars in Long Beach. This is not surprising, and in fact Respondent noted in his testimony that he went out drinking for his birthday, around the time of the test.

There was no explanation, not even a dubious one (see *Case No. 81455/05* [Aug. 3, 2007] [wife wanted to force husband to retire as result of failed drug test so she laced his meatballs with marijuana], confirmed sub nom. Matter of Chiofalo v. Kelly, 70 A.D.3d 423 [1st Dept. 2010]) as to why a fellow officer would have wanted to destroy Respondent's career. Nor was there any explanation of why no one else at the bar saw this happen. The letter writer, in fact, gave no indication that he or any other employee or patron saw this occur. There was no explanation as to how Frank would have known that Respondent would be randomly drug-tested within 72 hours, much less three months, so as to cause him to place the cocaine at that time. See *81455*, dissenting opinion later adopted by Police Commissioner, p. 16 (rather than crediting wife's testimony because she claimed she laced the meatballs well before the test, dissent pointed out that wife could have put the supposed lacing of the meatballs well before the test as part of a contrived but flawed story because she did not know the look-back period).

Even if the tribunal were to entertain the letter's claims, Cairns's testimony demonstrated that it was more likely than not that the alleged scenario did not occur. First, if "Frank" poured the cocaine into a glass or bottle of beer, the majority of the powder would have floated on top. Second, if the lacing of the beer was a one-time event, the test results indicated essentially that 200 lines of cocaine had been placed in the beer at once. This easily would have led to death. If "Frank" had placed the cocaine in the beer without Respondent's knowledge – a prerequisite to his defense as he never testified about any feeling of intoxication – there would have had to have been placement of the cocaine on 100 separate days. It defies credibility that "Frank" could have done this even on a fraction of those days without anyone noticing or objecting, especially Respondent or his other friends.

In sum, the tribunal finds the claim of involuntary ingestion to be speculative and unpersuasive. Accordingly, it is rejected. See Matter of Jackson v. Safir, 261 A.D.2d 348 (1st

Dept. 1999) (trial commissioner validly rejected officer's claim of unknowing ingestion as "self-serving and implausible"); *Case No. 71835/97*, pp. 9, 14 (Nov. 14, 1997) (rejecting aunt's testimony that she placed marijuana in husband's tea to relieve pain, then accused officer drank some, and she did not think to tell him any of this, as "vague, inconsistent, and implausible"); *Case No. 71410/96*, pp. 15-17 (Feb. 4, 1997) (rejecting drug addict's testimony that he hated police officers, so when he unexpectedly attended a party where accused officer, a stranger to him, was present, he spiked his drink with cocaine, but then changed his mind when officer offered to get him into drug treatment in exchange for his testimony; further, the officer had not known about the test at the time of the party, so the addict could not have reasonably expected his act would harm his career).

Conclusion

The Court finds that the Department proved through the Psychemedics hair and Quest urine test results that Respondent ingested and possessed cocaine. Accordingly, Respondent is found Guilty.

PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 9, 2004. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Department has a strong interest in not employing individuals who ingest and possess illegal drugs such as cocaine. Therefore, the Court recommends that Respondent be terminated from employment with the Department. See *Case No. 2013-9490* (June 16, 2015) (nearly 13-year member with no prior disciplinary history dismissed from Department for possessing and ingesting cocaine); *Case No. 86365/10* (Jan. 17, 2012) (over 19-year member, no

history, same result), confirmed sub nom. Matter of Jones v. Kelly, 111 A.D.3d 415 (1st Dept. 2013) (penalty not shocking to Appellate Division's sense of fairness, as Police Commissioner is responsible to the public for the Department's integrity).

Respectfully submitted,

David S. Weisel
Assistant Deputy Commissioner – Trials

APPROVED
MAR 21 2016
WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER BRENDAN MCGARRY
TAX REGISTRY NO. 935736
DISCIPLINARY CASE NO. 2014-11288

Respondent received an overall rating of 3.5 "Highly Competent/Competent" on his three most recent annual performance evaluations. [redacted] He has no prior formal disciplinary record.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner Trials